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NO. 90-7435

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES LEE SPENCER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

(9)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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46 pp

QUESTIONS PRESENTED

I.

Should this Court grant certiorari to consider whether Georgia's long-standing rule barring impeachment of verdicts by jurors should be overturned to allow Petitioner to delve into jurors' mental processes?

II.

Should this Court grant certiorari to consider a procedurally defaulted Batson v. Kentucky, 476 U.S. 79 (1986), claim when (a) trial counsel did not specifically raise a challenge at trial; (b) the claim was first raised by new counsel for Petitioner nine months later in the second amended motion for new trial; and (c) this case was tried after the announcement of the timeliness rule of State v. Sparks, 257 Ga. 97, 355 S.E.2d 658 (1987)?

III.

Should this Court grant certiorari to consider Petitioner's meritless contention that the Georgia courts allegedly reinterpreted state law to conclude a voluntary manslaughter instruction was not required under the facts of this case when this rule is well-settled in Georgia and consistent with this Court's decision in Hopper v. Evans, 456 U.S. 605 (1982)?

IV.

Should this Court grant certiorari to consider the question of whether Petitioner was allegedly precluded from presenting mitigating evidence in the form of testimony of an out of state witness where the federal question was not reached below and the facts showed that the whereabouts of this witness were not known, this witness was not under subpoena and counsel could give no assurances of when this witness would arrive in Georgia to testify at trial?

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PART ONE

STATEMENT OF THE CASE

Petitioner, James Lee Spencer, was originally indicted by the Burke County grand jury in 1974 for murder, aggravated assault and escape. Upon a trial by jury, Petitioner was found guilty on all counts and sentenced to death for murder and to ten years each on the aggravated assault and escape convictions, to run concurrently with each other. His convictions and sentences were affirmed on direct appeal. Spencer v. State, 236 Ga. 697, 224 S.E.2d 910 (1976), cert. denied, 429 U.S. 932, 97 S.Ct. 339 (1976).

In 1977, Appellant filed a petition for state habeas corpus relief. Following an evidentiary hearing, relief was denied. The Georgia Supreme Court affirmed the denial of relief. Spencer v. Hopper, 243 Ga. 532, 255 S.E.2d 1 (1979), cert. denied, 444 U.S. 885, 100 S.Ct. 178 (1979).

Petitioner then filed an application for federal habeas corpus relief. Relief was denied by the district court, but the en banc circuit court ultimately remanded the case for an evidentiary hearing on Petitioner's claims regarding challenges to the composition of the grand and traverse juries. Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986) (en banc). Following an evidentiary hearing in the district court on the jury composition issues, the district court granted relief as to Petitioner's convictions and sentences. Spencer v. Kemp, No. CV-179-247 (S.D. Ga. March 31, 1987).

On April 29, 1987, Petitioner was reindicted by the Burke County grand jury for aggravated assault, malice murder, and escape. (R. 1). The case was tried under the Unified Appeal Procedure. At a jury trial beginning August 31, 1987, the jury found Petitioner guilty on all three counts on September 3, 1987. (R. 98). The jury found the existence of three statutory aggravating circumstances: "the offense of murder was committed by said defendant with a prior record of convictions for the capital felony of rape," O.C.G.A. § 17-10-30(b)(1); "the offense of murder was committed by said

defendant while in the lawful custody of a police officer," O.C.G.A. § 17-10-30(b)(9); and "the offense of murder was committed by said defendant for the purpose of avoiding custody in a place of lawful confinement," O.C.G.A. § 17-10-30(b)(10). (R. 104). On September 3, 1987, the jury sentenced Petitioner to death for murder. (R. 106). The trial court sentenced Petitioner to ten years for aggravated assault and ten years for escape, to run consecutively to each other and consecutively to the murder sentence. (T. 1034).

The motion for new trial was filed September 27, 1987, and amended by trial counsel on January 5, 1988. (R. 112; 136). Trial counsel subsequently withdrew. (R. 121). New counsel entered the case on March 3, 1988, and amended the motion for new trial three times. (R. 190; 229; 707). The amended motion for new trial was denied October 4, 1988. (R. 890). The motion to reconsider the denial of the amended new trial motion was denied October 19, 1988. (R. 982). A timely notice of appeal was filed and the case was appealed to the Georgia Supreme Court.

After briefs were submitted on behalf of the respective parties, oral argument was had before the Court on February 13, 1989. On May 25, 1989, the Court remanded this case to the Superior Court "for a hearing to determine whether the appellant's guilty pleas were knowing, intelligent and voluntary." The remand order provided that after a hearing and findings were entered by the trial court, the appeal would be

docketed "anew" in the Georgia Supreme Court.

Pursuant to the remand order, a hearing was held in the trial court on January 16, 1990. On March 28, 1990, the trial court found that the state established that Petitioner's 1970 and 1974 guilty pleas were constitutionally valid.

The case was then rappelaed, rebriefed and reargued in the Georgia Supreme Court. On November 21, 1990, that court affirmed Petitioner's convictions and sentences. Spencer v. State, 260 Ga. 640, 398 S.E.2d 179 (1990). Rehearing was denied December 19, 1990.

The instant petition seeks review of the direct appeal decision. A review of the facts as established at trial is now set forth to assist the court in determining whether certiorari should be granted.

Burke County resident Robert Hickman, and his brother, were at Morris Grocery between 10:10 and 10:15 a.m. on October 31, 1974. (T. 675-77). The store was located at the forks for Highways 24 and 25. (T. 676). Highway 25 linked Waynesboro to Reidsville. Id. A person came into the store and asked them to call for an ambulance because someone allegedly had been run over. (T. 677). Hickman and his brother left while the store manager called for help. Id. One hundred yards from the store Hickman saw an elderly man standing at the trunk of a car while another man lay on the right shoulder of the road, bleeding. (T. 678-79). The elderly gentleman standing at the rear of the

car told Hickman not to come closer because the person sitting in the car had shot the man who was lying on the roadside. Id. The wounded man, who was too bloody for Hickman to distinguish any facial features, appeared to be trying to get up. (T. 680). The man inside the car, whose hands were free, asked Hickman to help him and to let him out. (T. 680-81). Hickman then realized the car had a cage between the front and back seats, so Hickman left to retrieve his gun from his truck. (T. 681-82). While Hickman was at his truck retrieving his weapon, he heard some shots in rapid fire. (T. 684). When Hickman returned, Trooper Parker was handcuffing Appellant. Id. The elderly gentleman, Lett Williams, was lying on the ground by the right front door of the car. (T. 684). The trooper and Hickman gave mouth to mouth resuscitation to Mr. Williams. (T. 685). Hickman then rode in the ambulance with Mr. Williams, who had sustained a head wound. Id. Hickman had also seen Petitioner, who was the man in the car, with a small caliber, blue automatic pistol which resembled State's Exhibit No. 1. (T. 685).

Dr. James Jackson, an orthopedic surgeon in Augusta, Georgia, and his wife were traveling through Waynesboro on the same morning. (T. 700, 706). They came upon a car parked in the middle of the road with two men outside the car, one lying on the roadside. (T. 701-702). The doctor

stopped his vehicle because he could not get by. Id. The doctor then saw a man in the back seat of the car and from seeing the cage realized it was a police car. (T. 702). The man was sitting sideways on the backseat, his right arm in the back window, kicking the right rear door with his foot. (T. 702-703). The man, who the doctor later learned was Petitioner, held a small caliber pistol in his right hand. (T. 703). The doctor saw that the man lying on the roadside, Deputy Hunter Beazley, was injured; Beazley said he had been shot and that Petitioner was trying to kill him. (T. 703). A "copious" amount of blood was on the right side of the deputy's face. Id. Lett Williams, who was crouched behind the police car, told the doctor to watch out because the man in the car had a gun. (T. 704). The doctor got back in his car, backed it up 100 yards to a store, and went in to call the police. (T. 704). The doctor told a man in the store, who was there in a truck and who had a gun, to call police and then bring the gun. Id. At that point the doctor looked back and saw that a patrolman had arrived from the opposite direction and stopped. Lett Williams was lying on the ground beside the police car, and a black male was running across the side of the road towards the woods. (T. 704). The patrolman fired several shots, and the black male fell to the ground. Id. The black male wore a

tee shirt and blue jeans. (T. 705). Upon the doctor's return to the stopped vehicle, the doctor saw that Lett Williams was lying on the ground and had turned blue, indicating he was probably dead. (T. 705). The doctor and his wife took Deputy Beazley to the Burke County Hospital which was a half a mile away. (T. 706). The doctor saw that one of Beazley's eyes was severely damaged, and the doctor thought the bullet had actually penetrated the eye. (T. 706). Beazley expressed his concern about his eye, the fact that he had no vision in one eye, and the fact that the man inside the car had not gotten Beazley's gun. Id.

Burke County resident Leslie Padgett was also traveling on Highway 25 that same morning and stopped his car when he noticed a car stopped in the road. (T. 710-11). One man was lying on the ground on the right side of the car, an elderly man stood at the back of the car, and someone was inside the stopped car. (T. 711). As Padgett got out of his car, he noticed that the stopped car was rocking as if someone were fighting inside. (T. 711). Padgett noticed that the man lying on the ground was "real bloody." As Padgett reached in to get his weapon from his car, Padgett saw the elderly gentleman go from behind the car to the passenger side of the stopped vehicle, lean over into the car, and "saw him get

shot" by the man inside the car. (T. 712). "When Mr. Williams stuck his head in the car, the guy that was in the backseat just put the pistol up to his head and pulled the trigger, shot him point blank." (T. 713). At this point a trooper pulled up beside the stopped vehicle. (T. 714). The passenger, who Padgett later learned was Petitioner, jumped out of the rear right window of the car, which had either been shot or kicked out. (T. 714). The trooper began firing at Petitioner, and Petitioner fell to the ground. (T. 714). Petitioner had chains around his waist but his hands were free. (T. 714-15). Padgett identified State's Exhibit No. 1 as a gun resembling the gun the trooper had recovered from Petitioner. Id.

Trooper Charles Parker was on Highway 29 en route to the sheriff's office, came over a rise and saw a cream over bronze Pontiac, headed south, headlights on, stopped in the road with the left front tire across the center line and the right passenger door open. (T. 719-23). The trooper saw a large man in a white shirt get up from the right shoulder of the road and run from the stopped vehicle. (T. 724). The back of the man's shirt, his head and arms were red. Id. The trooper then saw a black male inside the car moving around rapidly, lying down, and kicking the right rear passenger door. (T. 724). The

black male sat up and the trooper realized that the man was in the backseat behind the cage. (T. 724-25). The man in the car then fired a shot through the right rear window, shattering some glass. (T. 725). The man jumped out of the window feet first and ran down the shoulder of the road, towards the trooper. (T. 725). Trooper Parker got out of his car, drew his revolver and fired three quick shots. (T. 725). The man crouched down, turned and saw the trooper. Id. The man then turned and began running toward the woods. Id. The trooper fired another shot, and the man tumbled into a ditch. Id. The trooper overtook him, after picking up a small, dark automatic pistol. (T. 725). The man, who the trooper identified as Petitioner, was then handcuffed by the trooper. (T. 725, 727). Petitioner had on belly chains but had no handcuffs on his wrists. (T. 727). The trooper identified State's Exhibit No. 1 as the weapon he recovered from Petitioner and as the weapon he had seen in Petitioner's hand while Petitioner was in the car. (T. 727).

Trooper Parker and Leslie Padgett, who assisted the trooper in subduing Petitioner, stripped Appellant of his pants and searched him to make sure Petitioner had no other weapon. (T. 729). The trooper then placed Petitioner in the patrol car, making Petitioner sit on his pants because Petitioner had a slight wound to his left

buttock. The trooper noticed that Petitioner had one tennis shoe lace tied loosely around his right ankle. (T. 730). The trooper left Leslie Padgett to watch Petitioner while the trooper went over to the Pontiac to check on the man lying on the ground, face up, who subsequently was identified as Lett Williams. (T. 730-31). The trooper administered mouth to mouth resuscitation and CPR to Mr. Williams until the ambulance arrived, but the trooper thought Mr. Williams was already dead. (T. 730-31). The trooper subsequently checked the unmarked police car for additional weapons and found a holstered handgun, probably a .357 magnum, on the dashboard. (T. 732-33).

Deputy sheriff Hunter Beazley was transporting Petitioner from the Richmond County jail to the prison in Reidsville. (T. 821-25). His father-in-law, Lett Williams, was riding with him for company and to visit a friend in Reidsville while the deputy delivered Appellant to the prison. (T. 824-25). A message came over the police radio that Appellant was armed. (T. 828-30).

Fellow jail inmate Thomas Yancey had told deputy J. B. Dykes, after Appellant left the jail, that Petitioner had a gun. (T. 635, 639; 661, 661-63). Petitioner apparently also had a handmade handcuff key, which he had also shown to Yancey before Petitioner left the jail. (T. 664).

Without any warning and after the radio transmission, Petitioner began shooting and shot deputy Beazley in the back. (T. 829). The deputy snatched the steering wheel back and forth in an effort to keep Petitioner off balance, but Petitioner kept shooting. (T. 829-30). The deputy was shot five times, four times in the back of the head and the fifth bullet going through his left eye. (T. 829-31). At this point the deputy stopped the car and simply placed his head in his father-in-law's lap. Id. The deputy eventually opened the door because Mr. Williams was not familiar with the door latches. Id. The deputy pushed Mr. Williams out and away from the car, and the deputy crawled out. Id. Petitioner had the gun on Mr. Williams, telling him to open the door, and the deputy prevented his father-in-law from doing so. (T. 831). The deputy remembered telling his father-in-law to go for help but Mr. Williams stayed. (T. 831). Deputy Beazley remembered telling Mrs. Jackson who he was, that he was transporting a prisoner, and that the prisoner had a gun and had shot both deputy Williams and his father-in-law. (T. 831-32). The Jacksons then took him to the hospital. (T. 832).

Petitioner was subsequently taken to University Hospital and x-rayed to locate a handcuff key officers believed he had on him. (T. 635-37). The x-ray showed

that the key was in a space between Petitioner's teeth. (T. 652). Petitioner then spit out the key. (T. 653). Deputy Dykes checked the homemade key, and it did unlock handcuffs. Id.

The gun recovered from Petitioner was a .25 caliber, 7 bullet capacity Titan semi-automatic pistol. (T. 726; 770). Investigator Larry Hendrix recovered two empty shell casings from the backseat of the unmarked police car; three empty shell casings on the left rear floorboard; and two empty shell casings from the right rear floor board for a total of seven empty casings. (T. 769). The investigator also recovered a portion of a .25 semi-automatic bullet from the right front floor board of the car. (T. 769-70). One bullet hit the deputy and hit the top of the car, as evidenced by the bullet hole in the headliner which had hair and flesh around it. (T. 772).

Petitioner testified at the guilt-innocence phase and admitted shooting deputy Beazley and Mr. Williams. (T. 836, 846). Petitioner contended he did not have the intent to kill, claiming he was frightened and panicked after he heard the radio transmission. (T. 846-47). He also contended he did not want to shoot Mr. Williams. (T. 847). However, Mr. Padgett had clearly seen Petitioner shoot Mr. Williams "point blank." (T. 713).

The jury found Petitioner guilty of malice murder, aggravated assault and escape. (T. 940).

At the sentencing phase, the state presented no additional evidence in aggravation. (T. 946). Petitioner presented the testimony of a clinical chaplain from the Georgia Diagnostic and Classification Center (T. 953) and of his mother. (T. 964).

The jury found the existence of three statutory aggravating circumstances and sentenced Petitioner to death for malice murder. (T. 1028). The trial court sentenced Petitioner to ten years on each of the other two counts, to run consecutively to each other and consecutively to the murder conviction. (T. 1034).

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO OVERTURN GEORGIA'S LONG STANDING RULE BARRING JURORS FROM IMPEACHING THEIR VERDICTS TO PERMIT THE POST-VERDICT INQUIRY INTO JUROR'S MENTAL PROCESSES.

Petitioner initially urges this Court to grant certiorari to consider whether Georgia's long-standing rule barring post-verdict inquiry into the mental processes of jurors, should be overturned to allow Petitioner to inquire into whether racial prejudice may have tainted his death sentence, a sentence based upon the unanimous finding, by an evenly racially-split jury, of three statutory aggravating circumstances. The thrust of Petitioner's argument is based upon language in McCleskey v. Kemp, 481 U.S. 279, 292 (1987), noting that in order to establish an equal protection violation, "McCleskey must prove that the decision makers in his case acted with discrminatory purpose." The Georgia Supreme Court refused to consider Petitioner's affidavit of one juror who asserted that two other jurors allegedly during deliberations made racial remarks. Respondent submits that an

examination of this long-standing rule and the policies behind it shows that the Georgia Supreme Court did not arbitrarily rely upon it to avoid reaching a federal constitutional question. Respondent further submits that the court properly declined to consider the affidavit under the facts of this case.

Petitioner was tried by a jury of six whites and six blacks. Spencer, 260 Ga. at 643, n.2. This Court is well familiar with the operation of Georgia's capital sentencing scheme which requires the jury to find the existence of at least one statutory aggravating circumstance in order to impose a death sentence. Zant v. Stephens, 462 U.S. 862, 876 (1983). Furthermore, the jury's verdict must be unanimous, as the jury was so charged in this case. (T. 1018-19, 1023). Allen v. State, 253 Ga. 390, 393(2), 321 S.E.2d 710 (1984). Petitioner's death sentence rests upon the jury's finding of three statutory aggravating circumstances: Petitioner had a prior conviction of a capital felony of rape, the murder was committed while Petitioner was in the lawful custody of a police officer, and the murder was committed for the purpose of avoiding custody in a place of lawful confinement. O.C.G.A. §17-10-30(b)(1); (b)(9); and (b)(10).

Post trial, new counsel for Petitioner sought to show that his convictions and death sentence were the result of racial discrimination through the proffer of the hearsay affidavit of

juror Ella Pearl Moore who contended she was a member of the jury and overheard one identified female white juror and a second unidentified white male juror make some racial comments during deliberations. (R. 879-80). The affiant then contends she "knew" what was in the minds of some of the other jurors by her assertion, "I know that race and racial bias was a significant factor that some of the jurors used in reaching their decision in this case." (R. 879). Such an assertion would otherwise be rendered incompetent as this juror cannot possibly know what was in the minds of other jurors and, thus, was stating matters beyond her own personal knowledge. The trial court declined to consider the affidavit, relying upon O.C.G.A. §17-9-41 which prohibits a juror from impeaching his verdict. (Motion for New Trial Transcript, Sept. 22, 1988, p. 122-28). The trial court left the affidavit under seal and refused to read it on the basis that the affidavit sought to impeach the verdict.

O.C.G.A. §17-9-41 provides, "The affidavits of jurors may be taken to sustain but not to impeach their verdict." The Georgia Supreme Court found no abuse of discretion in the trial court's refusal to consider the affidavit. Spencer, 260 Ga. at 643-44. The court reviewed the "important public interests" that this long-standing rule promotes, as the "rule discourages post-verdict harassment of jurors, enhances verdict finality and certainty, encourages free and open discussion among jurors

during deliberations, and insulates jury value judgments from judicial review." Id. at 643. The court further noted that the rule "is not absolute" as it may yield to allow inquiry "in cases where extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interefered with the jury's deliberations." Id. at 643.

Indeed, the court cited to Federal Rule of Evidence 606(b), which similarly bars post-verdict inquiry into jurors' mental processes and which was the subject of Tanner v. United States, 483 U.S. 107 (1987). In Tanner, this Court noted that this similar federal rule "is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences." Tanner, 483 U.S. at 121. In Tanner, this Court declined to order a federal evidentiary hearing on whether jurors used alcohol and drugs during the trial and deliberations and to permit evidence from jurors themselves. Id.

The Georgia Supreme Court in this case concluded that the rule in question "is sufficiently race-neutral that further protection [to assure equal justice] is not required, and that the evidence in the present case did not reach a level that would justify disregarding the rule." Spencer, 260 Ga. at 644. The court further assumed for purposes of argument that the affidavit was true and concluded that it "shows only that

two of the 12 jurors possessed some racial prejudice and does not establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die." Id. The court found that other than the affidavit, Petitioner "offered no evidence that racial bias affected the jury's decision," and compared this case to Dobbs v. Zant, 720 F. Supp. 1566 (N.D. Ga. 1989). Id.

Under McCleskey, Dobbs was permitted to depose jurors in an effort to establish whether "jurors acted with discriminatory purpose when they decided to impose the death penalty." Even that court, however, noted that "only certain types of prejudice" would entitle a habeas corpus petitioner to relief from sentence and then reviewed the entire record in that case including voir dire at trial; the "lengthy deposition questioning" on the topic of racial views in the juror depositions; the racial composition of the jury (10 of 11 deposed jurors were white); the fact that most jurors found racial slurs were insulting although two had admitted using a particular word on occasion with only one intending the use to be negative; responses on jurors' attitudes towards blacks as a whole and concluded that Dobbs "has not shown a risk of racial prejudice affecting the sentencing decision to the extent that the death penalty was given unconstitutionally." Dobbs, 720 F. Supp. at 1579. "Dobbs has not shown that the jurors, either individually or as a whole, were influenced by prejudices that

would make them favor the death penalty for a black person who murdered a white person." Id. That case is currently pending in the Eleventh Circuit.

Further, in Tanner this Court noted that "the suitability of an individual for the responsibility of jury service, of course, is examined during voir dire." 483 U.S. at 127. Petitioner here does not complain of any restrictions on voir dire regarding racial bias. Indeed, the only such assertion raised on direct appeal was that the trial court allegedly restricted the questioning of prospective R. A. Joseph, who Petitioner contended in another error should have been excused for cause based upon his knowledge of the case. Trial counsel told the court he wanted to explore racial bias with this prospective juror, and the court told counsel to ask the question and "then maybe you'd have an answer to it." (T. 43-44). Counsel asked the prospective juror if the juror were biased, and the juror replied he did not think he was. Counsel did not seek to propound any other questions regarding racial bias. Petitioner raised no other contentions regarding the alleged restrictions on voir dire on this subject, and the state court on appeal found they lacked merit. Spencer, 260 Ga. at 641(d). Thus, Petitioner had the additional safeguard in this case of an inquiry into racial bias on voir dire.

Respondent submits that the decision of the Georgia Supreme Court is proper under the facts of this case. Given the long

standing policies against instrusion into jurors' mental processes, the strength of the evidence against Petitioner, the racial composition of this jury, and the fact that they returned three statutory aggravating circumstances to support their sentence of death for malice murder, Respondent submits that Petitioner has even failed to establish sufficient a basis under McCleskey which would have warranted any further inquiry into jurors' mental processes. For these reasons, Respondent would urge this Court to decline to grant certiorari on this issue.

II. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO CONSIDER A PROCEDURALLY DEFAULTED CHALLENGE TO THE PROSECUTOR'S USE OF PEREMPTORY STRIKES.

In this second question presented for review, Petitioner urges this Court to grant certiorari to consider the merits of his challenge to the prosecutor's use of strikes under Batson v. Kentucky, 476 U.S. 79 (1986). Petitioner ignores the fact that the Georgia Supreme Court found the claim was procedurally defaulted because Petitioner first raised it after trial in his second amended motion for new trial or, alternatively, urges this Court to conclude that the rule relied upon is inadequate. Respondent submits that a review of the facts of this case shows that this case is readily distinguishable from Ford v. Georgia, ___ U.S. ___, 111 S.Ct. 850 (1991), and that the procedural default rule was correctly applied in this case so that this Court should decline to grant certiorari.

Unlike Ford, here, counsel filed no pretrial motion seeking to restrict the prosecutor's use of peremptory strikes upon black venireman. Further, no objection was raised by trial counsel for Petitioner before, during or following the striking of the jury. (T. 611). The jury was then sent out

without being sworn, and a unified appeal hearing was held during which the prosecutor asked whether a Batson objection was being raised. (T. 612-17). The following colloquy between the trial court and defense counsel occurred:

> The Court: Of course, I advised counsel about that in the beginning, and I saw no evidence of that. If you want to make any record, I'll let you make it at this time.
>
> Mr. Allen [defense counsel]: Your Honor, I would like to just reserve that objection, if I may. I really haven't had a chance to even consider it at this moment in time.
>
> The Court: All right, sir, there is no objection at this time. All right, bring the jury back, please.

(T. 617-18). The jury was brought in, sworn in, and then the prosecutor began his opening statement. (T. 618).

Trial counsel thereafter never asserted any Batson claim. Instead, the Batson challenge was first raised on June 8, 1988,

in the second amended motion for new trial by new counsel for Petitioner. (T. 190, 202 p. 17). The trial occured on August 31-September 3, 1987, approximately nine months before. The claim was reasserted in the third and fourth amended motions for new trial filed, respectively, on June 8, 1988, and September 16, 1988. Id. at 229, 707.

Further, like Ford, because of the change of counsel at the motion for new trial level, the ineffectiveness of trial counsel issue has already been litigated. Unlike Ford, however, here this record discloses trial counsel's strategy regarding any Batson challenge, and trial counsel specifically did stated he did not raise a Batson challenge because he did not see a need to raise such a challenge. (Motion for New Trial Transcript, Sept. 22, 1988, p. 82-88). Trial counsel Allen recalled that the prosecutor struck as many blacks as whites and that the composition of Petitioner's trial jury was six whites, six blacks and two black alternate jurors. Id. at 83. Trial counsel Allen initially considered making a Batson challenge but "after we looked at everything, when we looked at everything, we didn't think it was there." Id. Trial counsel "felt comfortable with the results." Id. at 85. Trial counsel also concluded that Batson was not violated after he reviewed decisions dealing with Batson and because the prosecutor here did not strike every black. Id. at 87. Thus, despite having attempted to "reserve" any objection in the heat of trial,

trial counsel ultimately made an informed, tactical decision not to raise a Batson challenge.

On direct appeal, the Georgia Supreme Court concluded that any Batson claim was not preserved for review due to the lack of a timely challenge. Spencer, 260 Ga. at 641-43. The court rejected Petitioner's argument that his Batson challenge was not defaulted on the basis that the trial court had allegedly "permitted" defense counsel to reserve the right to raise a Batson challenge. Id. The state had asserted on direct appeal that there was no authority under state law to allow Petitioner to reserve a Batson objection as state law permits trial counsel to "reserve" objections to the trial court's charge on the case in chief prior to submitting the case to the jury for deliberation. Foshee v. State, 256 Ga. 555(2), 350 S.E.2d 416 (1986). The Georgia Supreme Court held that "the trial court did not explicitly allow counsel to reserve his objection; the court only noted there was no objection 'at this time.'" Spencer, 260 Ga. at 642. The Court noted that even if the trial court's remarks were "liberally construed to implicitly grant the defendant some additional time" to make such a challenge, the court did not think that the response could be interpreted to allow the defendant to wait till after trial and raise such a challenge in one of his amendments to the motion for new trial. Id.

At the time Petitioner's case was tried in August 1987, the Georgia Supreme Court had held in Childs v. State, 257 Ga. 243, 257(21), 357 S.E.2d 48 (1987), that a Batson claim must be raised in a timely matter and that after trial was too late. Childs was decided on June 18, 1987. The rule of State v. Sparks, 257 Ga. 97, 355 S.E.2d 658 (1987), which this Court examined in Ford to conclude it was not properly applied in Ford's case, was decided May 19, 1987, more than three months prior to the commencement of Petitioner's trial. In Ford itself, this Court did not invalidate the prospective rule announced in Sparks - i.e., that "any claim under Batson should be raised prior to the time the jurors selected to try the case are sworn." Ford, 111 S.Ct. at 858, quoting Sparks, 257 Ga. at 98.

Petitioner now seeks to circumvent Sparks by asserting it was not "firmly established" at the time of Petitioner's own trial. This Court has never explicitly decided how long a rule must be in effect in order for it to be firmly established. Instead, this Court has simply noted that novelty in procedural requirements cannot bar review of a federal question. Ford, 111 S.Ct. 857-58. However, Respondent poses the question of how a rule may become "firmly established" if it is questioned at every application despite the fact that in a case such as here, the rule had been clearly announced and consistently applied by the Georgia Supreme Court as in Childs, where the

Batson claim was first raised after trial so that the claim was deemed untimely. Indeed, in Ford, this Court observed, "Undoubtedly, then, a state court may adopt a general rule that a Batson claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected." Ford, 111 S.Ct. at 857. Thus, where Petitioner was tried clearly after the announcement of the prospective Sparks rule; where an additional case had alerted trial counsel that raising a Batson claim after trial was too late; and where trial counsel made a reasoned, tactical decision not to raise a Batson claim but the claim was instead asserted by new, post-conviction counsel nine months after the actual trial of this case, Respondent submits that the procedural bar applied by the Georgia Supreme Court in this case constitutes an independent and adequate state ground.

Respondent further notes that the Georgia Supreme Court never went to the merits of the Batson claim so that Petitioner's reliance upon the footnote is misplaced. Specifically, the Georgia Supreme Court concluded, "We hold this claim is not preserved for review." Spencer, 260 Ga. at 643. In a footnote, the Court noted that "the trial jury was evenly split racially, and trial counsel testified at the hearing on the motion for new trial that he 'did not see a need to raise a Batson challenge.'" Id. at 643 n. 2. The state appellate court never went to the merits of the Batson claim.

Rather, it is clear that the court explicitly relied upon the state procedural bar. Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1044 n. 10 (1989).

Finally, Petitioner seeks to circumvent the procedural bar by noting that the prosecutor allegedly went to the merits of the Batson claim at the motion for new trial level. As Respondent vigorously asserted in Ford, Georgia does not have a "waiver by the state" rule. Rather, the plenary powers afforded the Supreme Court of Georgia allows that court to correct any error which may occur below, which may include deciding whether a procedural bar should be applied. For these additional reasons, Respondent would urge this Court to decline to grant certiorari to consider the defaulted Batson challenge.

III. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO CONSIDER THE LACK OF INSTRUCTION ON A LESSER-INCLUDED OFFENSE WHERE THERE WAS NO EVIDENCE TO WARRANT A VOLUNTARY MANSLAUGHTER INSTRUCTION UNDER STATE LAW.

Petitioner urges this Court to grant certiorari to consider whether the Georgia Supreme Court has allegedly, on a case-by-case basis, sought to circumvent Beck v. Alabama, 447 U.S. 625 (1980), regarding the charging of lesser included offenses in capital cases and its decision that no voluntary manslaughter charge was authorized by the facts of this case. The Georgia Supreme Court relied on Hopper v. Evans, 456 U.S. 605 (1982), wherein this Court clarified Beck to require that in capital cases, lesser included offenses must only be charged if supported by the evidence, in concluding that under these facts no charge on voluntary manslaughter was required.

Voluntary manslaughter is defined under Georgia law as follows:

> A person commits the offense of voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as the

result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an intervel between the provocation and the killing sufficient for the voice of reason and inhumanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and shall be punished as murder.

O.C.G.A. §16-5-2.

Provocation by words alone is inadequate to reduce murder to manslaughter, even if profane language is used. Hunter v. State, 256 Ga. 372, 349 S.E.2d 389 (1986); Aguilar v. State, 240 Ga. 830, 242 S.E.2d 620 (1978). The proximity of threats from a victim that he was going to get the defendant and then threatening movements may constitute sufficient provocation to warrant an instruction. Moore v. State, 228 Ga. 662(1), 187 S.E.2d 277 (1972); Tew v. State, 179 Ga. App. 369, 346 S.E.2d 833 (1986). Georgia law does provide that it is not necessary to voluntary manslaughter that the defendant had been acting in self-defense. Coleman v. State, 256 Ga. 306, 307, 348 S.E.2d 632 (1986).

The facts in this case show that some time elapsed between the malice murder and the aggravated assault. Petitioner claimed that when the message came over the police car radio that Petitioner had a gun, Petitioner claimed he did not have the intent to kill and that he was "frightened" and "panicked" after he heard the radio transmission. (T. 846-47). Petitioner shot deputy Beasley five times, the aggravated assault. The murder of Mr. Williams occured sometime later as the deputy and Mr. Williams had gotten away from the police car and Mr. Williams had apparently walked back up to the vehicle. (T. 712-13). Leslie Padgett had seen Mr. Williams, who he described as an elderly gentlemen, go from his place behind the police car to the passenger side of the stopped vehicle, lean over into the car, and "when Mr. Williams stuck his head in the car, the guy that was in the backseat just put the pistol up to his head and pulled the trigger, shot him point blank." (T. 713).

Petitioner testified at the guilt/innocence phase as follows:

> For some reason, Mr. Williams came back to the car. Came back to the passenger side of the car, to the front seat, and I shouted, "Get away from the car, old man. I don't want to shoot you", and he

started to leave. And again, he decided against that, and decided that he would try a second time. I said, "Get away, old man. I do not want to shoot you." He reached for the pistol on the dash, and when he did, the only thing I could think of was to keep him away from the gun, and I shot Mr. Williams. But, I didn't want to shoot Mr. Williams. I didn't want to shoot Mr. Beasley [the deputy]. But I did that. I shot both Mr. Beasley and I shot Mr. Williams. As a result, Mr. Williams died, and Mr. Beasley, he has suffered because of me. I didn't want to do that, but I'm not sitting here trying to deny the fact that I did. I did do that.

(T. 846-47).

Respondent submits that under these facts, the trial court was clearly authorized to decline to charge on voluntary manslaughter as there was no evidence to warrant such an instruction. It is clear that Petitioner was not acting out of passion or hot blood or from provocation but acting more analogous to self defense in allegedly trying to keep Mr. Williams from the gun. Self defense is justifiable homicide,

and if the jury believed such a story, it would return a verdict of not guilty, not a verdict of voluntary manslaughter.

Moreover, there is no evidence of any threats by the victim before Petitioner shot him. Georgia law requires both threats accompanied by provocative conduct for a voluntary manslaughter charge. Houston v. State, 256 Ga. 276, 278, 347 S.E.2d 556 (1986). Petitioner's reliance upon Washington v. State, 249 Ga. 728, 731, 292 S.E.2d 836 (1982), is misplaced as Washington involved both threats from the victim accompanied by provocative conduct. While Washington recognizes that "fear of some danger can be sufficient provocation to excite passion," cases since Washington have made very clear that there must be both threats from the victim and provocative conduct. See, e.g., Veal v. State, 250 Ga. 384, 385(1), 297 S.E.2d 485 (1982); Saylors v. State, 251 Ga. 735(2), 309 S.E.2d 796 (1983); Coleman v. State; Hunter v. State, 256 Ga. 372(2), 349 S.E.2d 389 (1986); Hambrick v. State, 256 Ga. 688(2), 353 S.E.2d 177 (1987). Thus, under these facts, Respondent submits the Georgia Supreme Court correctly concluded that no voluntary manslaughter instruction was required by Hopper v. Evans as there was no evidence to warrant an instruction. Spencer, 260 Ga. at 643. Thus, Petitioner's claims of inconsistent application of this rule fail.

Petitioner urges this Court to grant certiorari on this issue in light of Schad v. Arizona, ___ U.S. ___ 111 S.Ct. 243 (1990), wherein this Court granted certiorari to consider whether a state may avoid Beck v. Alabama by "denying that a necessarily included offense is a 'lesser included offense' under state law." Respondent submits that Schad is readily distinguishable from the instant case. The Arizona court held, "Although we agree with the defendant that the evidence supported an instruction and conviction for robbery, we disagree that the underlying felony supporting a felony murder conviction requires a lesser-included offense instruction and form a verdict." Schad v. Arizona, 788 F.2d 1162, 1168 (Ariz. 1989). In the instant case, the Georgia Supreme Court found that there was simply no evidence to warrant an instruction on voluntary manslaughter not that there was supporting evidence but another state rule barred its being charged. Again, relying on Hopper v. Evans, Respondent would urge this Court to decline to grant certiorari on this issue.

IV. THIS COURT SHOULD DECLINE TO CONSIDER A FEDERAL QUESTION REGARDING THE ALLEGED EXCLUSION OF MITIGATING EVIDENCE WHICH WAS NOT REACHED BELOW.

In the final issue presented for review, Petitioner urges this Court to grant certiorari to consider the affirmance by the Georgia Supreme Court of the trial court's denial of Petitioner's motion for continuance during the sentencing phase of trial. Petitioner sought a continuance to allow an out of state witness to arrive, whose whereabouts were unknown at the time counsel made the request. Respondent submits that the Georgia Supreme Court properly resolved the factual premise adversely to Petitioner and did not need to reach any federal question so that this Court should decline to consider a federal question which was not decided below.

As the rule of sequestration was invoked at the beginning of the sentencing phase of trial, Petitioner stated that all other mitigating witnesses were present with the exception of "one other witness, who was flying in from Oregon and her plane will not be here until about 4:00 o'clock." (T. 947). Counsel then stated that he had sent her money for her flight and that counsel "expected to reach her late this afternoon or first thing tomorrow morning." (T. 947-48). Counsel indicated that

this witness' testimony was essentially that "she and her family have corresponded with James Spencer, corresponded letters back and forth. They had visited with him at the jail. She can testify what she has seen in terms of change in his attitude in life over the last nine years." (T. 950). The trial court told counsel to proceed "with what you've got, put that up and then we will see where we are going after that and see what the situation is with reference to time." (T. 952). Petitioner then called the chaplain at the prison where Petitioner had been incarcerated who regularly visited, observed and talked with Petitioner as well as Petitioner's mother. (T. 953; 963).

The trial court then brought up the matter again by asking defense counsel when he counsel had first known he would be calling this person, with counsel indicating he had "known this for several weeks." (T. 971). The trial court ascertained why this witness had not been told to be present earlier, and counsel indicated the witness was employed and they were trying to coordinate flights and save money as counsel was advancing the funds. (T. 971-73). Counsel then admitted that he had not sought funds from the court to secure the presence of this out of state witness as is permitted under O.C.G.A. §24-10-90 et seq. (T. 973). When asked if the witness had even left Oregon, counsel stated that he did not really know as he had encountered "some difficulty communicating back and forth with

this witness." (T. 975-76). The trial court noted that this was the first time the matter had been broached, that the court had provided funds and assistance to Petitioner on other matters and that if the court had been so informed, the court might have provided funds for that purpose. (T. 976-77). The trial court granted Petitioner a 30 minute recess to determine whether the witness had left Oregon, when she would arrive, and also gave Petitioner the option of profferring her testimony to the jury in writing. (T. 979-80). Upon reconvening, Petitioner still had no idea about the whereabouts of the witness and profferred her testimony. (T. 980-85). Court then reconvened with the parties giving closing argument, the trial court charging the jury, and the jury ultimately returning its verdict of a death sentence.

On appeal, the Georgia Supreme Court held as follows:

> The trial court did not abuse its discretion by refusing to grant a continuance at the sentencing phase of the trial to await the arrival of a witness who was not under subpoena, whose whereabouts were not known for sure, who had corresponded with the defendant but had only seen him a few times in prison, and whose possible

testimony the court was informed about only on the afternoon of the last day of trial. See Wilson v. State, 250 Ga. 630(a) (300 S.E.2d 640) (1983); O.C.G.A. §17-8-25.

Spencer, 260 Ga. at 652(16).

O.C.G.A. §17-8-25 provides grounds for the granting of a continuance upon the absence of a witness which requires a showing, which includes in pertinent part, that the witness is absent; that he has been subpoenaed; that he does not reside more than one hundred miles from the place of the trial by the nearest practical route; that his testimony is material; that the witness is not absent by the permission, directly or indirectly of the applicant..." and where the applicant must state what would expect to be proved by the testimony of the absent witness.

In this case, Respondent submits that it is clear that this issue was resolved solely under state law so that no federal question is presented for review by this Court. This Court has recognized the wide latitude to be afforded trial judges in scheduling trials. Morris v. Slappy, 461 U.S. 1, 11 (1983). Where here the trial had progressed to almost completion, Petitioner could not state the whereabouts of his witness nor assure her arrival. Respondent submits that Petitioner had failed to establish a compelling reason for a continuance at that point. Id. Accordingly, Respondent submits no federal question is presented for review under this issue.

CONCLUSION

This Court should decline to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that the federal questions presented to this Court for review were correctly decided under precedent of this Court, that no novel federal questions are presented, and that no federal question is raised by an issue resolved solely on state law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Brief, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This 25th day of April, 1991.

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